No. 92-588

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

HELEN B. BARNES, M.D.; JOSEPH MITCHELL, M.D.; JOSEPH BOOKER, M.D., on behalf of themselves, their patients, and all others similarly situated; NEW WOMAN MEDICAL CENTER, INC.; and MISSISSIPPI WOMEN'S MEDICAL CENTER,

Petitioners,

—v.—

MIKE MOORE, as Attorney General of the State of Mississippi, and his employees, agents and successors,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Respondent's opposition to certiorari in this case is based on three arguments. First, Respondent contends that the Fifth Circuit judgement in this case was "mandated" because the Mississippi statute challenged here is "'substantially identical'" to the relevant part of Pennsylvania's statute held constitutional on its face in *Casey*." Respondent's Brief in Opposition to Certiorari at

4-5 (citation omitted).[1] Second, Respondent contends that "no conflict among the Circuits or disagreement of other courts with the Fifth Circuit has had time to mature." R. Opp. at 6. Third, Respondent contends that a constitutional standard for reviewing restrictive abortion laws that depends on an individual factual assessment in each case will engender "confusion and uncertainty." R. Opp. at 11. Petitioners reply to these arguments in so far as they raise matters not previously addressed in their Petition.

Respondent's first argument assumes that there is "no material distinction," R. Opp. at 4, between the language, purpose, and effect of the Mississippi law at issue here and the Pennsylvania law at issue in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 112 S. Ct. 2719 (1992).[2] As the court of appeals acknowledged, however, even the text of the two laws is different. 4a - 6a.[3] Moreover, because Petitioners sought to prove their case under the standards of *Roe v. Wade*, 410 U.S. 113 (1973), and its progeny, there was no evidentiary record before the courts below on the "purpose" of the Mississippi law and

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[1] Citations to Respondent's Brief in Opposition to Certiorari will hereinafter be to "R. Opp. at __."

[2] After *Casey*, the constitutionality of a law restricting abortion is based on whether the law in question "has the *purpose* or *effect* of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." 112 S. Ct. at 2820 (emphasis added).

[3] Petitioners briefed the nature of these textual differences and their significance in the health care context at some length in the court below. *See* Supplemental Brief of Plaintiffs-Appellees in *Barnes v. Moore*, No 91-1953 at 9-18 (5th Cir. filed July 22, 1992). The court of appeals made no attempt to analyze these differences seriously or to assess the constitutional significance of Mississippi's more restrictive requirements.

no evidence on whether the "effect" of the law would be to impose a "substantial obstacle" on the choices of Mississippi women.[4] There is, thus, a total absence of any foundation for a conclusion that the Mississippi law is identical to that at issue in *Casey* in those respects that are material to the constitutional analysis.

As to Respondent's argument that there is no conflict among circuit courts, there is now an emerging divergence of opinion in the courts of appeals regarding the correct application of the "undue burden" test, at least as to pending cases in the lower courts. *See* Supplemental Brief in Support of Petition for a Writ of Certiorari (filed herewith).[5] It is critical that this Court clarify whether

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[4] The "truncated" hearing that did occur in the district court, 14a, focused almost entirely on the health consequences of the statute's strict medical emergency requirement, regarding which there was then no constitutional precedent from this Court. However, as described in the Petition for a Writ of Certiorari at 9 (hereinafter "Pet. at ___"), and substantiated by declarations reprinted and appended thereto, *see* 22a - 28a, the burdens imposed on Mississippi women by the state's 24 hour waiting period will be exceptionally severe. Indeed, these burdens already appear to have effectively precluded abortion for some women. 29a - 40a. These declarations should be considered as a preliminary offer of proof regarding evidence to be submitted on remand and the facts they set forth should be viewed as true for purposes of this Court's review of the pre-trial dismissal of this case by the court of appeals. Whether or not these facts are accurate or admissible, *see* R. Opp at 9 n. 8, and whether or not they establish an "undue burden," simply cannot be conclusively decided by a Supreme Court decision in a *different* case regarding a *different* statute from a *different* state on a record that itself attempted only to meet the no-longer-applicable standard of strict scrutiny under *Roe*, 410 U.S. 113, and the cases that followed.

[5] Indeed, the decision of the Third Circuit on remand in *Casey* is contrary to the argument of Respondent that the constitutionality of the (continued...)

plaintiffs challenging restrictive abortion laws -- including laws with varying degrees of similarity to the law at issue in *Casey* -- are entitled to an opportunity to meet their newly heightened burden of proving that a law is unduly burdensome. Without an individual assessment by a trial court of the sufficiency of the existing record, a decision of this Court that lets stand the Fifth Circuit's conclusory assertion that "[f]urther evidentiary proceedings would not affect . . ." the constitutionality of the Mississippi law, 7a, threatens to eviscerate the protection offered to Petitioners by *Casey*'s undue burden standard. Where courts of appeal differ on a matter of such importance, review by this Court is essential.

Finally, Respondent argues that uncertainty and confusion will result if *Casey* requires a factual assessment of the burdens imposed by a law in every case. Nearly every member of this Court has recognized that case-by-case factual determination of the substantiality and nature of any obstacle to the abortion choice intended by a legislature and imposed by a law is the necessary consequence of the shift from the strict scrutiny of *Roe* to the undue burden analysis of *Casey*. *See* Pet. at 13-16. It is also the necessary consequence of permitting those who assert violations of constitutional rights under this standard to have their day in court. If confusion will indeed be the consequence, as Respondent contends, then review of this case and clarification by this Court is even more critical.

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[5] (...continued)
Pennsylvania law was conclusively determined by the decision of this Court in that case. *See* Appendix to Supplemental Brief.

Respectfully submitted,

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